

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No: 05-CV-0329-GKF-PJC
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA’S REPLY TO  
DEFENDANTS’ RESPONSE TO MOTION *IN LIMINE* PERTAINING TO  
RULE 26(E) EXPERT “ERRATA” (DKT. #2424)**

Plaintiff, the State of Oklahoma, ex. rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (hereinafter “the State”), respectfully submits its Reply to “Defendants’ Joint Response in Opposition to Plaintiffs’ [sic] Motion *in Limine* Pertaining to Rule 26(e) Expert “Errata” [Dkt. #2424]” (Dkt. #2503) (“Response”):

1. Under Rule 26(e)(1), a party is under a duty to supplement “at appropriate intervals its disclosure under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional and corrective information has not otherwise been made known to the other parties during the discovery process or in writing...” “[W]hen mistakes are made, caught, corrected and *satisfactorily* explained by the expert in a supplemental report, as required by the Rule 26(e), no adverse inference as to the reliability of the expert’s opinion need be drawn.” *In re Commercial Financial Services, Inc.*, 350 B.R. 520, 557-58 (Bkrtcy. N.D. Okla. 2005) (emphasis in original). “There is no stigma attached to [expert report] error

correction. If anything, it strengthens the quality of the expert report.” *Crowley v. Chait*, 322 F. Supp. 2d 530, 540 (S.D. Ohio 2004). This Court has already found that the State’s expert errata were “mandatory under Rule 26(e)” and denied Defendants’ request to strike the expert errata or any portions thereof. *See* Dkt. #1787 at 3-5. Under such circumstances, neither the fact that the State served Rule 26(e) expert errata, nor the circumstances that precipitated the need for the State to serve expert errata, has any probative value. Moreover, even assuming *arguendo* that such evidence would have probative value, such probative value would be substantially outweighed by the danger of unfair prejudice and/or confusion of the issues.

2. In their Response, Defendants argue that “the errors committed by the witnesses in preparation of their opinions . . . [is] surely . . . proper cross-examination and evidence.” Response at 3-4. But, for what purpose? Evidence or examination concerning errors which were identified and corrected by an expert have no purpose other than to improperly stigmatize the witness and his work. This is improper. The State’s experts diligently complied with the Federal Rules in correcting identified mistakes in a subset of the initial Rule 26 expert reports. The experts’ current and correct opinions, analysis and data are plainly relevant and certainly fair game for cross-examination. By the same token, the existence of errata and the circumstances necessitating the errata do not “advance the inquiry of some consequential fact to be considered relevant and admissible.” *United States v. Oldbear*, 568 F.3d 814, 820 (10th Cir. 2009).

3. At the very least, evidence and questioning regarding the existence of errata and the circumstances necessitating the errata, even if relevant for some purpose, can only serve to confuse the true issues in this case and prejudice the State by potentially

creating an unfair adverse impression about the State's expert case. Thus, such evidence and questioning should be precluded under Fed. R. Evid. 403. The State should not be punished for complying with the mandates of Rule 26(e). If anything, the experts' attentiveness in making necessary corrections should be viewed as strengthening their opinions and should not be fodder for Defendants to unfairly attack the experts by taking the jury down rabbit trails of discarded data and antiquated analysis. The State's Motion *in Limine* should be granted.

WHEREFORE, premises considered, the State respectfully requests that the Court grant its Motion *in Limine* Pertaining to Rule 26(e) Expert "Errata" (Dkt. #2424).

Respectfully submitted,

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I certify that on the 4<sup>th</sup> day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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